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No. 03-872

In the Supreme Court of the United States

SYBLE M. VAUGHN AND W.T. SUMNER, PETITIONERS

v.

ANTHONY J. PRINCIPI, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Petitioners in this consolidated case separately appealed from denials of veteran survivor benefits, and each obtained a remand for reconsideration. The question presented is whether those remands–in one case for consideration of new legislation and in the other case for consideration of newly acquired, material evidence–are sufficient to make either petitioner a "prevailing party" under *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001) for purposes of an attorney's fee award under the Equal Access to Justice Act, 28 U.S.C. 2412(d).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 336 F.3d 1351. The opinions of the United States Court of Appeals for Veterans Claims (Pet. App. 38-43, 44-61) are reported at 15 Vet. App. 256 and 15 Vet. App. 277.

JURISDICTION

The judgment of the court of appeals (Pet. App.18-19) was entered on July 24, 2003. A petition for rehearing was denied on October 3, 2003 (Pet. App. 20-21). A petition for a writ of certiorari was filed on December 12, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners Syble Vaughn and W.T. Sumner separately applied for veteran's benefits. In each instance, the Board of Veterans' Appeals (BVA) denied their benefit requests, but the Court of Appeals for Veterans Claims (CAVC) remanded their claims for reconsideration. Thereafter, petitioners each sought an award of attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412. The CAVC denied those fee requests on the ground that neither petitioner qualified as a "prevailing party" for purposes of EAJA. The court of appeals, in a consolidated decision, affirmed the CAVC's decisions.

1. EAJA authorizes a court to award a reasonable attorney's fee to a qualifying "prevailing party" in a "civil action" unless the position taken by the United States in the proceeding at issue "was substantially justified" or "special circumstances make an award unjust." 28 U.S.C. 2412(d)(1)(A). See *Sullivan* v. *Hudson*, 490 U.S. 877, 883 (1989). Congress has made such awards available to small businesses and individuals that might be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing vindication of their rights. See S. Rep. No. 253, 96th Cong., 1st Sess. 5 (1979).

EAJA requires that a party seeking attorney's fees "shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought." 28 U.S.C. 2412(d)(1)(B). The statute defines "party" to mean "an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or * * * any owner of an unincorporated business, or any partnership, corporation, association, unit of

local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed." 28 U.S.C. 2412(d)(2)(B).

2. Congress has enacted the Veteran's Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (VCAA), which mandates that "the Secretary shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary." 38 U.S.C. 5103A(a)(1). Under the VCAA, the Department of Veterans Affairs (VA) has a duty to inform the claimant "of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim," even if the claim has not yet been found "well-grounded." 38 U.S.C. 5103A(a). The VA can help the claimant obtain evidence that will be necessary to prove eligibility for the claim sought. H.R. Rep. No. 781, 106th Cong., 2d Sess. 10 (2000). The claimant still retains the burden of proving entitlement to the claim, but the VA will provide reasonable resources to assist the claimant in finding evidence to support the claim. In addition, the VA will "provid[e] a medical examination or obtain[] a medical opinion when such an examination or opinion is necessary to make a decision on the claim." 38 U.S.C. 5103A(d).[1]

3. Petitioner Vaughn applied for veteran survivor benefits after her husband's death in 1995. Pet. App. 3. The BVA denied Vaughn's claim on June 2, 2000, after

[1] Congress enacted the VCAA in response to a series of court decisions that construed 38 U.S.C. 5107 in a manner that permitted the VA to refrain from providing assistance to claimants prior to determining whether their claim was "well-grounded." See H.R. Rep. No. 781, *supra*, at 8. Congress wished to reaffirm and clarify the VA's duty to assist claimants in obtaining evidence for claims, bearing in mind the VA's goal of helping those who deserve benefits. See *id.* at 9.

finding that her husband's cause of death was not connected to military service. *Ibid.* Vaughn appealed the denial to the CAVC. *Ibid.* Congress enacted the VCAA while Vaughn's appeal was pending. In response, Vaughn and the Secretary of Veterans Affairs filed a joint motion for remand on the issue of service connection so that the issue could be reconsidered in light of the VCAA. *Ibid.* The CAVC consented to the remand. Vaughn thereafter filed an application for attorney's fees under EAJA, based, *inter alia*, on a "catalyst theory," which posits that a plaintiff may be a "prevailing party" if the plaintiff achieves the desired result of the lawsuit as a consequence of the defendant's voluntary change in conduct. *Id.* at 3-4.

After Vaughn filed her EAJA application, this Court decided *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001). Pet. App. 4. *Buckhannon* rejected the practice of treating an attorney's fee claimant as a "prevailing party" under the catalyst theory. *Buckhannon*, 532 U.S. at 601. The Court held that a claimant is a "prevailing party" only if the claimant obtains either an "enforceable judgment[] on the merits" or a "court-ordered consent decree[]." *Id.* at 604. The CAVC held that *Buckhannon* precluded Vaughn from achieving prevailing party status "under the merits, catalyst, or inevitable victory tests based on obtaining a remand solely for readjudication in light of the enactment of the VCAA." See Pet. App. 4.

4. Petitioner Sumner applied for veteran's benefits, which the BVA denied. Pet. App. 4. Sumner appealed the denial of benefits to the CAVC, and, while his appeal was pending, Sumner filed a motion with the BVA for reconsideration based on newly acquired, material evidence. *Id* at 4-5. He also filed a motion with the CAVC to stay his

appeal pending the BVA's decision. *Id.* at 5. The CAVC stayed the appeal and ordered the Secretary to advise the court whether the BVA was inclined to grant the motion for reconsideration, and, if so, to file a motion for a "*Cerullo* remand." *Ibid.* See *Cerullo* v. *Derwinski*, 1 Vet.App. 195, 200 (1991) (explaining that, once a notice of appeal has been filed, the CAVC retains jurisdiction, but if the BVA believes it is inclined to grant reconsideration, a motion for a remand to allow reconsideration can be filed with the court).

The BVA granted Sumner's motion for reconsideration and the Secretary filed an unopposed motion for a *Cerullo* remand. Pet. App. 5. After the CAVC remanded the case, Sumner filed a claim for attorney's fees under EAJA, under both a merits and a catalyst theory. *Ibid.* The *en banc* CAVC denied Sumner's EAJA application, holding that *Buckhannon* precluded Sumner from obtaining "prevailing party" status under either a merits or a catalyst theory. Relying on *Buckhannon* and *Shalala* v. *Schaefer*, 509 U.S. 292 (1993), the CAVC determined that, to prevail, Sumner had to obtain court-ordered "receipt of a benefit that was sought in * * * litigation" or "a court remand predicated on administrative error." Pet. App. 5.

5. Both Vaughn and Sumner appealed. The court of appeals consolidated the cases and affirmed. Pet. App. 5. The court held that Vaughn and Sumner failed to satisfy the requirements for "prevailing party" status under *Buckhannon* for two reasons. First, the court held that petitioners' remands were the result of a voluntary change in the VA Secretary's conduct and that their EAJA applications therefore were premised (as petitioners themselves admitted) on the very catalyst theory that *Buckhannon* had rejected. *Id.* at 8. Second, the court held that "the remand orders in these cases do not resemble the types of outcomes

that the Supreme Court identified as 'prevailing'" in *Buckhannon–i.e.*, a judgment "on the merits," *ibid.* (citing *Buckhannon*, 532 U.S. at 603), or a "settlement agreement[] enforced through a consent decree," *id.* at 9 (quoting *Buckhannon*, 532 U.S. at 604). In that regard, the court of appeals found petitioners' remands "similar to a ruling that reverses a dismissal for failure to state a claim [because they] provide only the opportunity for further adjudication" rather than relief on the merits of their claims. *Ibid.* Furthermore, the court determined that, "[i]n contrast to a consent decree, Vaughn's and Sumner's remands included neither a judgment nor a determination of the rights of the parties based on the facts of the case." *Ibid.* Accordingly, the court of appeals "affirm[ed] the judgments of the Veterans' Court in these cases because it applied the correct legal standard, as articulated in *Buckhannon*." *Id.* at 10.

Petitioners' counsel conceded at oral argument that *Shalala* v. *Schaefer*, *supra*, did not apply to the present cases. Pet. App. 10. Nonetheless, the court of appeals analyzed why *Schaefer* is inapplicable to those cases, despite the fact that the claimant in *Schaefer*, like petitioners here, received a remand to the administrative agency level. First, the court of appeals found *Schaefer* inapposite because the "award of attorney fees under EAJA in [*Schaefer*] was not premised on the catalyst theory. Rather than a voluntary change in the VA Secretary's conduct, the claimant in [*Schaefer*] achieved the desired result as a consequence of the district court's judgment after reaching the merits of the case." *Id.* at 11 (citing *Schaefer*, 509 U.S. at 294). Second, the court of appeals determined that "[*Schaefer*] is inapposite to the present cases because it concerns a 'sentence four remand'" under the fourth sentence of 42 U.S.C. 405(g), which "requires a district court to

enter a judgment 'with or without' a remand order.'" Pet. App. 11. (quoting *Schaefer*, 509 U.S. at 297). Consequently, the court found that "an award of attorney fees after a sentence four remand is consistent with the holdings of *Buckhannon* and *Brickwood* [*Contractors, Inc.* v. *United States*, 288 F.3d. 1371 (Fed. Cir. 2002), cert. denied, 537 U.S. 1006 (2003)] because the unique statutory language of sentence four includes a judgment on the merits with any remand order." Pet. App. 11-12.

The court of appeals also found that this Court's decision recognizing that a claimant may be a "prevailing party" based on a sentence six remand, see *Melkonyan* v. *Sullivan*, 501 U.S. 89, 102-103 (1991), unavailing to Vaughn and Sumner. See Pet. App. 12. In sentence six cases, the court noted, the district court retains jurisdiction and the government must return to the district court after post-remand proceedings to allow the district court to enter a final judgment. See *id.* at 12-13 (citing *Melkonyan*, 501 U.S. at 97, 98). In neither of petitioners' cases, however, "did the Veterans' Court retain jurisdiction and require the [Secretary] to return to the Veterans' Court to enter final judgment." *Ibid.* Hence, the court of appeals concluded that sentence six remands afford no basis for petitioners to claim "prevailing party" status in these cases.

Finally, the court of appeals rejected an argument that petitioners were prevailing parties based on an "inevitable victory" theory. See Pet. App. 13. Under the inevitable victory theory, a party prevails when a case is remanded because of a change in the law and a court finds that the party would have prevailed even in the absence of the change in the law. See *ibid.* Noting that the circuit courts were split on the validity of the inevitable victory theory, see *id.* at 13-14, the court of appeals found the theory inconsistent with *Buckhannon*, see *id.* at 16. The court of

appeals accordingly held that the petitioners were not entitled to EAJA fees under that theory. *Ibid.*[2]

ARGUMENT

The court of appeals correctly concluded that petitioners are not prevailing parties for purposes of receiving an attorney's fee award under EAJA. The petition for writ of certiorari does not present a conflict between the court of appeals' decision and any decision of this Court or of any other court of appeals, and further review is therefore not warranted. See note 2, *supra*.

1. The court of appeals properly relied on *Buckhannon* in deciding that petitioners are not "prevailing parties" for purposes of an award of attorney's fees. *Buckhannon* holds that only "enforceable judgments on the merits" or "court-ordered consent decrees" secure "prevailing party" status for purposes of an attorney's fee award. *Buckhannon*, 532 U.S. at 604. Those requirements for achieving "prevailing party" status prompted the Court to

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[2] The Fourth and Sixth Circuits have accepted the inevitable victory theory as a basis for awarding attorney's fees. *Perket* v. *Secretary of Health & Human Servs.*, 905 F.2d 129, 133 (6th Cir. 1990); *Rhoten* v. *Bowen*, 854 F.2d 667, 670 (4th Cir. 1988). The First, Fifth, Seventh, Eighth, and Ninth Circuits have rejected the inevitable victory theory as a basis for fees. *Peter* v. *Jax*, 187 F.3d 829, 835 n.4 (8th Cir. 1999), cert. denied, 529 U.S. 1098 (2000); *Milton* v. *Shalala*, 17 F.3d 812, 815 (5th Cir. 1994); *Petrone* v. *Secretary of Health & Human Servs.*, 936 F.2d 428, 431 (9th Cir. 1991), cert. denied, 502 U.S. 1091 (1992); *Guglietti* v. *Secretary of Health & Human Servs.*, 900 F.2d 397, 403 (1st Cir. 1990); *Hendricks* v. *Bowen*, 847 F.2d 1255, 1260-1261 (7th Cir. 1988). All of these cases, however, pre-date *Buckhannon*. Petitioners do not appear to rely on the "inevitable victory theory" in their petition for certiorari. Thus, although the government believes that the court of appeals was correct in rejecting the theory as inconsistent with *Buckhannon*, the government does not otherwise address that theory in this brief.

reject the "catalyst theory" (which petitioners relied on below, see Pet. App. 4, 5) as a basis for receiving attorney's fees. *Buckhannon*, 532 U.S. at 605.

Contrary to petitioners' suggestion (Pet. 6), this Court's decision in *Buckhannon* was not "limited to the rejection of the catalyst theory." Rather, the catalyst theory–under which a plaintiff achieves the desired result by virtue of the defendant's voluntary change in conduct–merely describes one of many possible ways in which litigation may not yield either an "enforceable judgment[] on the merits" or a "court-ordered consent decree[]." *Buckhannon*, 532 U.S. at 604. *Buckhannon*'s requirement that "a plaintiff receive at least some relief [from a court] on the merits of his claim," *id.* at 603 (quoting *Hewitt* v. *Helms*, 482 U.S. 755, 760 (1987), applies broadly to the general run of cases.

In Vaughn's case, the benefits claimant and the Secretary jointly requested a remand for a rehearing pursuant to newly enacted legislation, Pet. App. 3, while in Sumner's case, the CAVC granted the Secretary's unopposed motion for a remand to reconsider newly discovered evidence, *id.* at 4. In neither case did the court reach the merits of petitioners' benefits claims. There was no "material alteration of the legal relationship of the parties." See *Buckhannon*, 532 U.S. at 604 (quoting *Texas State Teachers Ass'n* v. *Garland Indpep. Sch. Dist.*, 489 U.S. 782-792 (1989)). Rather, as the court of appeals determined, the remands "included neither a judgment nor a determination of the rights of the parties based on the facts of the case." Pet. App. 9. Consequently, petitioners failed to satisfy *Buckhannon*'s requirements for "prevailing party" status. See *id.* at 10.

2. The court of appeals also correctly concluded—notwithstanding petitioners' waiver of the point, page 6, *supra*—that *Shalala* v. *Schaefer*, *supra*, is inapposite in the

circumstances presented here. In *Schaefer*, this Court considered whether a remand under sentence four of 42 U.S.C. 405(g) confers "prevailing party" status on a plaintiff. 509 U.S. at 300. The Court determined that a claimant is not usually a "prevailing party" merely because his case has been remanded for further agency action. See *id.* at 301. Under sentence four, however, a district court is required to "enter * * * a judgment affirming, modifying, or reversing the decision of the [Secretary], with or without remanding the cause for a rehearing." 42 U.S.C. 405(g). Thus, every remand order under sentence four is necessarily accompanied by a judgment on the merits that confers "prevailing party" status on the claimant. *Schaefer*, 509 U.S. at 300-302.

Sentence four of 42 U.S.C. 405(g) accordingly imposes special requirements that distinguish the Social Security scheme from other benefits review mechanisms. Congress's mechanism for review of BVA determinations, by contrast, does *not* require a judgment on the merits. See 38 U.S.C. 7252(a) ("The Court shall have the power to affirm, modify, or reverse a decision of the Board *or to remand the matter, as appropriate.*") (emphasis added). The CAVC may order a remand without entering a judgment affirming, modifying, or reversing the BVA's decision. A CAVC decision to remand a BVA decision without reaching the merits accordingly does not confer prevailing party status under *Schaefer*. See Pet. App. 12.[3]

Petitioners also mistakenly rely on Veteran Appeals Rule 41(b), which provides that the CAVC shall not retain

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[3] Petitioners are mistaken in suggesting that they obtained "judgments vacating the Board of Veterans Appeals decisions." Pet. 7. The CAVC entered no vacatur of the BVA's decision when it remanded petitioners' cases. Rather, the court simply entered orders remanding the case to the BVA. See Pet. App. 3, 5.

jurisdiction of appeals remanded to the BVA. See Pet. 6 (citing *Cleary* v. *Brown*, 8 Vet. App. 305 (1995)). Rule 41(b) simply establishes that a remand order will constitute a final judgment for purposes of appeal. The CAVC's failure to retain jurisdiction over remands does not mean that the remand is necessarily accompanied by a judgment *on the merits*. As explained above, the CAVC reached no merits determination when it remanded Vaughn's and Sumner's cases.[4]

The CAVC's failure to retain jurisdiction over the remands in the cases at issue here also precludes an analogy to remands made pursuant to sentence six of 42 U.S.C. 405(g). See *Melkonyan* v. *Sullivan*, 501 U.S. 89, 98, 102-103 (1991). Remands under sentence six require claimants to succeed on post-remand proceedings and for the Secretary to return to the district court with any additional or modified findings of fact and decision to allow the district court to enter a final judgment. See *ibid.* As the court of appeals correctly found, in neither of petitioners' cases "did the Veterans' Court retain jurisdiction and require the BVA to return to the Veterans' Court to enter final judgment." Pet. App. 13.

3. Petitioners contend that the CAVC misinterpreted precedent and created "a new prerequisite to 'prevailingness'" by requiring a remand based on administrative

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[4] Petitoners' reliance on *Cleary* v. *Brown*, 8 Vet. App. at 307, is misplaced. In *Cleary*, the CAVC held that it "does not have the authority to retain * * * jurisdiction over a decision remanded to the BVA for a new adjudication." The remand order in that case was analogous to a sentence four remand under 42 U.S.C. 405(g) because it accompanied a reversal of the Secretary's decision and directed the BVA to readjudicate the case in light of its reversal. See 8 Vet. App. at 308. *Cleary* is unlike the present cases because here, by contrast, the CAVC did not reverse the BVA's determinations when it remanded for reconsideration.

error. Pet. 8-10. The cases that petitioner cites, however, are not in conflict with the court of appeals' decision in this case. A remand based on administrative error may reflect a determination on the merits that confers "prevailing party" status. See *Former Employees of Motorola Ceramic Prods.* v. *United States*, 336 F.3d 1360, 1362 (Fed. Cir. 2003) (prevailing party status found because the agency made a mistake on the merits). See Pet. App. 16-17.[5]

The CAVC decisions that petitioners cite (Pet. 9-10) are consistent with the court of appeals' decision in this case because, in each instance in which a claimant received attorney's fees, the claimant had obtained a favorable judgment on the merits. See note 4, *supra*. And even if the CAVC decisions were inconsistent, they would not provide a basis for this Court's review, since they do not give rise to a conflict among courts of appeals. The Federal Circuit's decisions are consistent, see Pet. App. 16-17, and even if there were an intra-circuit conflict, that conflict would not provide a basis for this Court's review.

4. Petitioners also make broad equitable arguments about the interpretation of EAJA. Pet. 12. EAJA, however, is a partial waiver of sovereign immunity and not a malleable vehicle for furthering petitioners' conception of appropriate policy. A waiver of sovereign immunity must be strictly construed in favor of the United States. See

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[5] See also *Gordon* v. *Principi*, 17 Vet. App. 221, 222 (2003) (administrative error mentioned as an example of relief on the merits); *Halpern* v. *Principi*, 17 Vet. App. 225, 227 (2003) (suggesting a possible way to gain a benefit conferring prevailing party status is through a finding of administrative error); *McCormick* v. *Principi*, 16 Vet. App. 407, 409 (2002) (plaintiff found to be prevailing party when court vacated and remanded based on error below); *Cycholl* v. *Principi*, 15 Vet. App. 355, 358 (2001) (finding prevailing party status because the CAVC disagreed with the BVA's determination on the merits based on the BVA's failure to consider the VCAA).

Ardestani v. *INS*, 502 U.S. 129, 137 (1991). There is no basis for rewriting EAJA so that all plaintiffs whose cases are remanded are treated as "prevailing part[ies]" and entitled to attorney's fees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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